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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/723,376	11/26/2003	Alan D. Olin	2505130-991-201	8032

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DLA PIPER RUDNICK GRAY CARY US, LLP  
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EXAMINER
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PASCUA, JES F

ART UNIT	PAPER NUMBER
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3782

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/30/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	Application No. 10/723,376	Applicant(s) OLIN ET AL.	
	Examiner Jes F. Pascua	Art Unit 3782	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 03 November 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-24, 32 and 33 is/are pending in the application.
- 4a) Of the above claim(s) 3, 5-9, 11, 12, 15, 17-21, 23 and 24 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 4, 10, 13, 14, 16, 22, 32 and 33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Terminal Disclaimer***

1. The terminal disclaimer filed on 11/15/2006 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Patent No. 6,857,779 and U.S. Patent No. 7,011,448 has been reviewed and is NOT accepted.

2. The terminal disclaimer does not comply with 37 CFR 1.321(b) and/or (c) because:

The application/patent being disclaimed has not been identified.

### ***Double Patenting***

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

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Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1, 2, 4, 10, 13, 14, 16, 22, 32 and 33 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3, 5, 6, 9-11 and 13 of U.S. Patent No. 6,857,779. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of U.S. Patent No. 6,857,779 contain every element of claims 1, 4, 10, 13, 16, 22, 32 and 33 of the present application and as such anticipates claims 1, 4, 10, 13, 16, 22, 32 and 33 of the present application.

Regarding claims 2 and 14, the claims of U.S. Patent No. 6,857,779 meet the claimed bag except for the bottom end being generally ovoid in shape. It would have been an obvious matter of design choice to make the bottom end of U.S. Patent No. 6,857,779 generally ovoid in shape or whatever shape was desired or expedient. A change in form or shape is generally recognized as being within the level of ordinary skill in the art, absent any showing of unexpected results.

5. Claims 1, 2, 4, 10, 13, 14, 16, 22, 32 and 33 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 2 and 4 of U.S. Patent No. 7,011,448. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of U.S. Patent No. 7,011,448 meet the claimed bag except for the bottom end having a generally ovoid shape. It would have been obvious to one having ordinary skill in the art at the time the

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invention, was made to provide the bottom end of U.S. Patent No. 7,011,448 with a generally ovoid shape since it was known in the art that bags having a bottom end of generally ovoid shape permit the bag to be supported in an upright position.

***Claim Rejections - 35 USC § 102***

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

7. Claims 1, 10, 13 and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,687,848 to Scholz et al. See Fig. 12.

Scholz et al. discloses bag comprising a top end, a bottom end configured to support the bag in a generally upright position first and second, opposite side edges extending between the top and bottom ends and an opening located on the first side edge, proximate to the top end and closer to the top end than to the bottom end. The opening being made reclosable by magnetic strip 152. Furthermore, Fig. 12 shows sealed portion 156 proximate to the top end.

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8. Claims 1, 10, 13, 22, 32 and 33 are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. Patent No. 5,941,643 to Linkiewicz. See Fig. 3.

Linkiewicz discloses a bag comprising a left end, a right end having gusset 56, a top side 42 extending between the left and right ends and a bottom side 52 extending between the left and right ends. The Linkiewicz bag further comprises a pour spout opening located proximate to and oriented substantially parallel to the top side edge and is located closer to the left end than to the right end. The pour spout opening is made reclosable by fastener 48. In order to access the pour spout opening, Linkiewicz provides a tear strip that is removed along line of perforations 46.

Applicant's nomenclature for the ends and sides of the claimed bag do not structurally define over the ends and sides of the Linkiewicz bag as discussed above. Furthermore, the gusset 56 in the right end of the Linkiewicz bag would render it capable of being supported on the right end.

Regarding claims 10 and 22, the seal collinear with the fastener 48 in Fig. 3 meets the recitation "a sealed portion proximate to the top end".

9. Claims 1 and 13 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by U.S. Patent No. 6,164,826 to Petkovsek. See Fig. 5.

### ***Claim Rejections - 35 USC § 103***

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. Claims 2 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scholz et al. or Petkovsek.

Scholz et al. and Petkovsek each meet the claimed bag except for the bottom end being generally ovoid in shape. It would have been an obvious matter of design choice to make the bottom end of Scholz et al. or Petkovsek generally ovoid in shape or whatever shape was desired or expedient. A change in form or shape is generally recognized as being within the level of ordinary skill in the art, absent any showing of unexpected results.

12. Claims 4 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Linkiewicz and U.S. Patent No. 3,387,701 to Schneider et al.

Linkiewicz discloses the claimed device except for the top side and the left end having an included angle measuring less than 90 degrees. Schneider et al. discloses that it is known in the art to provide an included angle measuring less than 90 degrees between the top side and left end of another dispensing bag. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the top side and left end of Linkiewicz with the included angle measuring less than 90 degrees as in Schneider et al., in order to facilitate dispensing contents from within the bag.

***Response to Arguments***

13. Applicant's arguments filed 11/03/2006 have been fully considered but they are not persuasive.

In response to applicant's argument that the Scholz et al. reference fails to show certain features of applicant's invention, it is noted that the feature upon which applicant relies (i.e., a pour spout that is separate from the reclosable fastener) is not recited in the rejected claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. Furthermore, applicant's remarks fail to indicate the language in the claim that distinguishes applicant's "pour spout" from the opening being made reclosable by the magnetic strip 152 in Scholz et al.

Regarding applicant's argument that Linkiewicz explicitly defines the zip closure 48 along the opt edge 42 and therefore cannot disclose a reclosable fastener located along a side edge, applicant fails to point out the structure for the claimed reclosable fastener along a side edge that distinguishes it from the reclosable fastener along the top edge in Linkiewicz when the bags depicted in Figs. 1 and 3 are rotated 90° clockwise. Likewise, applicant's remarks fail to indicate the structure encompassed by the functional language "configured to rest upon the bottom end" to define over the gusset 56 of Linkiewicz when the bag depicted in Figs. 1 and 3 are rotated 90° clockwise.

Regarding applicant's argument that the pour spout of Petkovsek extends out from the inside edges, and thus is not located along a side edge, Fig. 5 of Petkovsek



clearly shows the pour spout 112 to be *along* the side edge as claimed. Furthermore, at least a portion of pour spout 112 is oriented *substantially* parallel to the side edge to same degree applicant's claims set forth the structure of a pour spout.

In response to applicant's arguments against the Schneider et al. reference individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references.

### ***Conclusion***

14. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jes F. Pascua whose telephone number is 571-272-4546. The examiner can normally be reached on Mon.-Thurs..

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nathan J. Newhouse can be reached on 571-272-4544. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Jes F. Pascua  
Primary Examiner  
Art Unit 3782

JFP